(9)

No. 99-1792

Supreme Court, U.S.
FILED
AUG
AUG 24, 2000
OFFICE OF THE CLERK

IN THE UNITED STATES SUPREME COURT

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Petitioner,

vs.

COBANK ACB, AS SUCCESSOR TO THE
NATIONAL BANK FOR COOPERATIVES,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF AMICUS CURIAE OF THE STATES OF OHIO, ALASKA, ARIZONA, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, VERMONT, AND WASHINGTON IN SUPPORT OF PETITIONER

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
ROBERT C. MAIER*
Assistant Solicitor
*Counsel of Record
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

38 pp

BRUCE M. BOTELHO
Attorney General
State of Alaska

JANET NAPOLITANO
Attorney General
State of Arizona

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

THURBERT E. BAKER
Attorney General
State of Georgia

EARL I. ANZAI
Attorney General
State of Hawaii

JAMES E. RYAN
Attorney General
State of Illinois

KAREN M. FREEMAN-WILSON
Attorney General
State of Indiana

RICHARD P. IEYOUB
Attorney General
State of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

JENNIFER M. GRANHOLM
Attorney General
State of Michigan

MIKE MOORE
Attorney General
State of Mississippi

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

PHILIP T. McLAUGHLIN
Attorney General
State of New Hampshire

ELIOT SPITZER
Attorney General
State of New York

HEIDI HEITKAMP
Attorney General
State of North Dakota

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

MARK BARNETT
Attorney General
State of South Dakota

WILLIAM H. SORRELL
Attorney General
State of Vermont

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF *AMICI* INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

A. A State needs no consent from Congress to impose nondiscriminatory taxes on the property, transactions and income of a federally chartered, but privately owned commercial lending business 8

B. Because Congress systematically addressed the scope of state tax immunity in the Farm Credit Act, no non-statutory doctrine of immunity applies 16

1. *Expressio unius* defeats the NBC's immunity claim 16

2. Because Congress adopted the method of explicitly specifying immunities in the Farm Credit Act, no immunities should be recognized under the Act except those explicitly authorized by statute 21

C. Principles of federalism call for a "clear statement" of Congress's intent to grant immunity 26

CONCLUSION 28

TABLE OF AUTHORITIES

PAGE

CASES:

In re: Appeal of Farm Credit Services of Central Kansas et al., Nos. 1998-2839-DT, et al., 1999 Kan. Tax LEXIS 78 (Oct. 25, 1999) 26

Arkansas v. Farm Credit Services of Central Arkansas, 520 U.S. 821 (1997) 3, 6, 11, 13, 14

Arkansas v. Farm Credit Services of Central Arkansas, No. 95-1918 14

Cipollone v. Ligget Group, Inc., 505 U.S. 504 (1992) 7, 17, 18

City of Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994) 20

CoBank ACB v. Fisher, No. 99CV437 (Colo. Dist. Ct. June 15, 2000) 26

Davis v. Elmira Savings Bank, 161 U.S. 275 (1896) 12

Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989) 9

Department of Revenue v. ACF Industries, Inc., 510 U.S. 332 (1994) 7, 26, 27

Farm Credit Services of Central Arkansas v. Arkansas, 994 S.W.2d 453 (Ark. 1999), cert. denied sub nom., *Arkansas v. Farm Credit Services of Central Arkansas*, No. 99-993, 68 U.S.L.W. 3613, 120 S. Ct. 1530 (Mar. 27, 2000) 25

Farm Credit Services of Mid-America v. Department of State Revenue, 677 N.E.2d 645 (Ind. Tax 1997) 24

Farm Credit Services of Mid-America v. Department of State Revenue, 705 N.E.2d 1089 (Ind. Tax 1999) 24

In re Farm Credit Services of Western New York ACA, Nos. 816576, 816604, 816605, 816606, 2000 N.Y. Tax LEXIS 7 (Jan 13, 2000) 26

Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95 (1941) 13, 14

Federal Land Bank v. Board of County Commissioners, 368 U.S. 146 (1961) 14

Federal Land Bank v. Priddy, 295 U.S. 229 (1935) 14

First Agricultural National Bank v. State Tax Commission, 392 U.S. 339 (1968) 10, 12, 21, 22

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 18

Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939) 9, 14

Gregory v. Ashcroft, 501 U.S. 452 (1991) 27

Intel Containers International Corp. v. Huddleston, 507 U.S. 60 (1993) 17

Jefferson County, Alabama v. Acker, 119 S. Ct. 2069 (1999) 6, 9, 16

Keene Corp. v. United States, 508 U.S. 200 (1993) 20

Mayo v. United States, 319 U.S. 441 (1943) 5, 11

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) ..... passim

Northwest Lousiana PCA v. State of La. Department of Revenue and Taxation, 746 So.2d 280 (La. App. 1999) 25

Owensboro National Bank v. Owensboro, 173 U.S. 664 (1898) 11, 12, 21

PCA of Eastern N.M. v.
Taxation and Revenue Department,
No. 20,078, 2000 N.M. App. LEXIS 8
(Feb. 1, 2000), *review denied*,
997P.2d 820 (N.M., Mar. 13, 2000), *cert. petition*
docketed July 28, 2000 (No. 00-156).....26

Rockford Life Insurance Co. v.
Illinois Department of Revenue,
482 U.S. 182 (1987).....16

Rodriguez v. United States,
480 U.S. 522 (1987).....20

Smith v. Davis, 323 U.S. 111 (1944).....17

South Carolina v. Baker, 485 U.S. 505 (1988).....15

United States v. County of Fresno,
429 U.S. 452 (1977).....4, 8, 9

United States v. Detroit, 355 U.S. 466 (1958).....16

United States v. New Mexico,
455 U.S. 720 (1982).....4, 8

Wardair Canada, Inc. v.
Florida Department of Revenue,
477 U.S. 1 (1986).....17

Washington v. United States,
460 U.S. 536 (1983).....15

Wisconsin v. J.C. Penney Co.
311 U.S. 435 (1940).....27

STATUTES:

Agricultural Credit Act of 1987,
Pub. L. 100-233, 101 Stat. 1639, §413 (1988).....19

Agricultural Credit Technical Corrections Act
of 1988, Pub. L. 100-399,
102 Stat. 989, 1003 (1988).....25

Farm Credit Act Amendments of 1980,
Pub. L. 96-592, §404,
94 Stat. 3437, 3447-48 (1980).....23

Farm Credit Act of 1971, Pub. L. No. 92-181
85 Stat. 583 (1971)..... passim
§§2.17, 3.13, 85 Stat. 602, 608.....23

Farm Credit Act of 1933,
72nd Cong., 2nd Sess., ch. 98, §63,
48 Stat. 257, 267 (1933).....23

Federal Farm Loan Act of 1916,
64th Cong., 1st Sess., ch. 245, §26,
39 Stat. 360, 380 (1916).....23

12 U.S.C. 531.....12

12 U.S.C. 1768.....12

12 U.S.C. 2023.....19, 24

12 U.S.C. 2077 ..... 19, 24

12 U.S.C. 2098 ..... 19, 20, 24

12 U.S.C. 2134 ..... passim

OTHER AUTHORITY:

J. Kayl, Note, "Farm Credit Amendments Act of 1985: Congressional Intent, FCA Implementation, and Courts' Interpretation (and the Effect of Subsequent Legislation on the 1985 Act)," 37 Drake L. Rev. 271, 275 (1987-88) 11

No. 99-1792

IN THE UNITED STATES SUPREME COURT

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Petitioner,

vs.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF AMICUS CURIAE OF THE STATES OF OHIO, ALASKA, ARIZONA, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, VERMONT, AND WASHINGTON IN SUPPORT OF PETITIONER

STATEMENT OF *AMICI* INTEREST

Amicus State of Ohio and 21 other *amici* States write to urge that the Court reverse the decision of the Supreme Court of Missouri. The States also write to place the particular issue presented here in its broader context. The question framed is quite precise: "Does 12 U.S.C. Section 2134 authorize states to tax the

income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?" But how the Court answers that question implicates far more than state taxation of the "National Bank for Cooperatives" (the "NBC"). At a minimum, the Court's analysis will affect some of the other federally chartered entities within the Farm Credit System. As of July 1, 2000, the Farm Credit Administration's Office of Policy and Analysis enumerated these institutions at 165. Of those, 53 were production credit associations, which have an immunity statute identical to the NBC's; and 44 were agricultural credit associations, which resulted from mergers of entities that had differing immunity statutes, but which themselves have no clearly applicable immunity statute.

When facing the question whether such entities are immune, state tax administrators need a reasonably simple method of ascertaining immune status that is consistent with the State's plenary, sovereign power to tax. At one extreme is the principle proposed by respondent and embraced by the Missouri Supreme Court: Farm Credit System institutions on this theory are generally immune from state taxation unless the state administrator finds an explicit congressional approval of particular state taxes. That is indeed simple, but such an approach cannot be squared with federalism's deference to the State's sovereign power to tax. Moreover, the respondent's theory bypasses the ordinary process of construing Congress's intent regarding immunity.

The amici States suggest a simple alternative: read the statutes Congress passed (here, the Farm Credit Act of 1971, as amended); grant the immunities Congress explicitly provided in the Act; and recognize no immunities beyond what Congress provided in the Act. Of course this does not mean a State can tax a federal agency exercising governmental responsibilities without consent by Congress; but where the entity is a federally-chartered private corporation whose activity consists of participating in a commercial lending market, the statutes must show congressional intent to immunize—either by expression (as in the Farm Credit Act), or, in a proper case, by a clear statutory implication. This approach respects the paramount role of Congress in determining the proper degree of state tax immunity; simplifies the job of ascertaining immunity; and at the same time respects the plenary nature of State taxing power within the federal system. It is an approach consistent with ordinary construction of statutes and with the teachings of this Court concerning pre-emption of state law generally.

Not least, our approach fulfills this Court's dicta that "tax immunity . . . is a permitted consequence of [an entity's] status as a federal instrumentality," but "[a]n instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes . . . without the further inference that the instrumentality has all of the rights and privileges of the National Government." *Arkansas v. Farm Credit Servs. of Central Arkansas*, 520 U.S. 821, 829 (1997). Because it ignores these precepts, the decision of the Missouri Supreme Court should be reversed.

SUMMARY OF ARGUMENT

1. The bedrock principle of intergovernmental immunity is that "a State may not, consistent with the Supremacy Clause, [ ] lay a tax 'directly upon the United States'." *United States v. New Mexico*, 455 U.S. 720, 733 (1982) (internal cite omitted). But that principle by its terms controls only where the entity to be taxed can be said to be the United States itself, or its alter ego agencies. The Court's case law shows two circumstances that have justified an automatic, judicial presumption of state tax immunity for a "federal instrumentality": federal government ownership, in which case taxing corporate property, transactions and income is *pro tanto* taxation of the United States itself; and the exercise of federal governmental functions, which raises the inference that state taxation would interfere with congressional purposes in chartering the instrumentality. But where a federally-chartered corporation such as the NBC is privately owned and engages in commercial lending as opposed to issuing the Nation's currency or acting as fiscal agent of the United States, the more applicable principle should be that "a tax not directly laid on the Federal Government ... is valid if nondiscriminatory ... or until Congress declares otherwise." *United States v. County of Fresno*, 429 U.S. 452, 460 (1977).

The respondent and the Missouri Supreme Court predicate their contrary view upon the teachings of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)—specifically, the doctrine that "federal

instrumentalities" should be constitutionally immune from state taxation absent an express consent by Congress. But that argument is mistaken for two reasons. First, *McCulloch* presents the case of the Second Bank of the United States, an entity in which the United States held 20% of the stock, whose directors consisted in part of Presidential appointees (5 of 25), and which exercised currency functions of a governmental nature. By contrast, the NBC is a privately owned entity engaging in commercial activity, with the result that the NBC simply cannot be said to embody "governmental action . . . carried on by the United States" that would justify "inherent freedom" from state taxation. *See, Mayo v. United States*, 319 U.S. 441, 448 (1943). Instead, the NBC stands firmly among those "instrumentalities" whose "subjection to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction," *id.*, at 447-48.

Second, the designation "federal instrumentality" is not dispositive of immune status, since it can mean an entity that is owned by the Government and/or exercises core governmental powers, as in *McCulloch*; or it may simply mean an entity that Congress has the power to immunize by statute if it chooses to do so. The latter is precisely the way Congress used the term in 12 U.S.C. 2134.

Two additional distinctions render *McCulloch*'s teachings inapplicable here. First, the tax in *McCulloch* discriminated against the federal entity because state-chartered banks and branches were not subject to the tax at issue. Here by contrast, Missouri

proposes to impose a general income tax on the NBC. Second, *McCulloch* addressed a situation where Congress made no provision concerning immunity one way or another. Here Congress, throughout the Farm Credit Act of 1971, as amended, exhaustively addressed state tax immunity and specified which institutions enjoy what degree of immunity.

Under all these circumstances, the rule that Congress must expressly consent to state taxation simply does not apply to the NBC.

2. Congress addressed the subject of state tax immunity throughout the Farm Credit Act, declaring specific immunities for specific institutions. It granted limited immunity for the obligations and debentures of banks for cooperatives at 12 U.S.C. 2134, which applies here. That should be dispositive: Congress conferred no state income tax immunity. As the Court has stated in the context of production credit associations, a Farm Credit lender's "tax immunity ... is a permitted consequence of its status as a federal instrumentality," but that status means the NBC "can enjoy the benefits and immunities conferred by explicit statutes, however, without the further inference that the instrumentality has all the rights and powers of the National Government." *Arkansas v. Farm Credit Servs. of Central Arkansas*, 520 U.S. 821, 829 (1997); *accord Jefferson County, Alabama v. Acker*, 119 S.Ct. 2069, 2077 (1999) (recognizing that "the area [of intergovernmental tax immunity] is one over which Congress is the principal superintendent").

Further support for limiting immunity to the express statutory grant comes from the Court's forceful application of *expressio unius* in the related context of pre-emption. *See Cipollone v. Ligget Group, Inc.*, 505 U.S. 504 , 517 (1992). Section 2134 immunizes only the NBC's obligations and debentures, and hence does not immunize the entity itself, or its income, property and transactions. More broadly, the method Congress adopted of explicitly detailing the immunities granted in the Farm Credit Act to various entities chartered within the Farm Credit System means that no immunities should be recognized apart from express statutory authorization of such immunity.

3. Principles of federalism lend additional strength to the primacy of the statutory grants of immunity. In construing a federal statute restricting State taxing powers, the Court has held that "[w]hen determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope." *Dep't of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994). Absent a clear and plain statement of Congress's intent to preempt State income taxes, the statutes should not be construed to permit such an immunity.

ARGUMENT

A. A State needs no consent from Congress to impose nondiscriminatory taxes on the property, transactions and income of a federally chartered, but privately owned commercial lending business.

At its foundation, the doctrine of intergovernmental tax immunity states that "a State may not, consistent with the Supremacy Clause [ ] lay a tax 'directly upon the United States'." *United States v. New Mexico*, 455 U.S. 720, 733 (1982). No one in this case contends otherwise, nor do the *amici* States doubt that Congress must expressly consent to any "tax [laid] directly upon the United States." But that does not mean that taxing a corporate entity that is completely under private ownership and that engages in lending activity for the commercial benefit of its private owners somehow constitutes a tax laid "directly on the United States," based solely upon the circumstance that it is chartered under federal (as opposed to state) law; or upon the fact that it is designated a "federal instrumentality" for some purposes. Indeed, the fact of private ownership makes it far more appropriate to invoke the converse principle: the doctrine that "a tax not directly laid on the Federal Government . . . is valid if nondiscriminatory . . . or until Congress declares otherwise. . .." *United States v. County of Fresno*, 429 U.S. 452, 460 (1977). That is especially true where the entity's function, as here, involves commercial

lending and not issuing the Nation's currency, or acting as a fiscal agent of the Federal Government.

Viewed under these bipolar principles, the property, transactions and income of the NBC constitute the private citizen's property interests rather than the interest of the Federal Government itself. *Fresno*, 429 U.S. at 456-57. In *Fresno*, the Court distinguished between taxing the possessory interest owned by a private party and taxing the Government's ownership interest as lessor—the Court held the private possessory interest could be taxed. From that standpoint, the present case is an *a fortiori* one: here private parties hold all ownership interests, while the Government is involved as the sovereign that chartered and regulated the corporation. Even less reason presents itself to confer automatic, per se immunity under these circumstances. *Accord Jefferson County, Alabama v. Acker*, 119 S.Ct. 2069, 2077 (1999) (intergovernmental tax immunity "closely confined ... to ba[r] only those taxes that [are] imposed directly on one sovereign by the other or that discriminat[e] against a sovereign or those with whom it deal[s]"), citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 811 (1989); *see Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939) (state tax approved where "[i]t is measured by income which becomes the property of the taxpayer when received as compensation for his services").

The Missouri Supreme Court predicated its contrary opinion upon its mistaken reading of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Specifically, the state court cited *McCulloch* (along

with some later cases) for the proposition that "the Supremacy Clause of the United States Constitution accords federal instrumentalities immunity from state taxation," and that "Congress can waive this immunity, but only if it expressly consents to state taxation." Pet. App. A-2. But *McCulloch* does not control here for two main reasons. First, the Second Bank of the United States differs materially from the NBC; second, the designation "federal instrumentality" does not by itself imply automatic state tax immunity.[1]

To be sure, *McCulloch* did specifically address the state tax immunity of a federally chartered bank, but there the similarities end and the material differences begin. In *McCulloch*, the United States Government owned 20% of the stock of the Second Bank of the United States, and the President accordingly appointed five of the 25 directors of the corporation. *First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 355 (1968) (opinion of Marshall, J., dissenting). The bank also exercised currency functions on behalf of the Government by issuing legal tender and serving as federal fiscal agent. *Id.* Thus, *McCulloch* exemplifies two circumstances justifying automatic, judicially created immunity: substantial federal ownership; and exercise of federal governmental functions.

---

[1] The other cases the Missouri Supreme Court cites are equally unconducive to its conclusion for the reasons set forth in our previous brief. *See* Brief of *Amicus* Ohio *et al.* (supporting petition for certiorari) at 13-15.

In both respects, the Second Bank of the United States contrasts sharply with the NBC. First, the NBC was privately owned, as were its predecessor "banks for cooperatives"—as were the production credit associations in *Arkansas v. Farm Credit Servs. of Central Arkansas*, 520 U.S. 821, 831 (1997). *See,* J. Kayl, Note, "Farm Credit Amendments Act of 1985: Congressional Intent, FCA Implementation, and Courts' Interpretation (and the Effect of Subsequent Legislation on the 1985 Act)," 37 Drake L. Rev. 271, 275 (1987-88). Second, the business of the banks for cooperatives, again like that of the production credit associations, was "making commercial loans," so that "[t]heir interests are not coterminous with those of the Government any more than most commercial interests." 520 U.S. at 831. Accordingly, the NBC simply cannot be said to embody "governmental action . . . carried on by the United States" that would justify "inherent freedom" from state taxation, *Mayo v. United States*, 319 U.S. 441, 448 (1943), but instead stands firmly among those "instrumentalities" whose "subjection to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction," *id.*, at 447-48.

It is true that, even apart from federal ownership of a bank, the Court has pronounced that the States had no power to tax the national banks inasmuch as the national banks were instrumentalities of the United States. *Owensboro Nat'l Bank v. Owensboro*, 173 U.S. 664, 668 (1898). But the Court apparently relied on a pre-emption analysis that state taxation would presumptively "either frustrate [ ] the

purpose of the national legislation or impair [ ] the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created," *id,* citing *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896); *see also First Agricultural Nat'l Bank*, 392 U.S. at 355-57 (opinion of Marshall, J., dissenting) (noting original functions of national banks to issue currency and act as fiscal agents of the Federal Government). Thus, the national banks exercised federal governmental functions with which state taxation might presumptively interfere.

As noted below, current pre-emption law calls for deference to Congress's own determination of the scope of pre-emption, with the result that the limited immunity conferred by 12 U.S.C. 2134 should be applied in accordance with its terms, and no additional immunity exists. In any event, the banks for cooperatives, like the production credit associations, do not resemble the early national banks because they engage in the "business [of] making commercial loans," so the grounds for judicially implied pre-emption in *Owensboro* are absent here.[2]

---

[2] As *Owensboro* notes, Congress quickly passed an immunity statute for national banks that specifically consented to certain taxes. 173 U.S. at 668. By the time *First Agricultural Nat'l Bank* was decided in 1968, the Court relied upon the statute and its history rather than on a doctrine of automatic immunity for instrumentalities. 392 U.S. at 346 ("Because of §548 and its legislative history, we are convinced that if a change is to be made in state taxation of national banks, it must come from the Congress, which has

The second main reason *McCulloch* does not control is that the mere designation "federal instrumentality" does not by itself imply automatic state tax immunity. In the context of the Farm Credit System, the Court has stated that "tax immunity . . . is a permitted consequence of [an entity's] status as a federal instrumentality," but "[a]n instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes . . . without the further inference that the instrumentality has all of the rights and privileges of the National Government." *Arkansas v. Farm Credit Servs. of Central Arkansas*, 520 U.S. 821, 829 (1997). Earlier, the Court had described the status of a Farm Credit System entity (a federal land bank) as an "instrumentality" that "Congress has the power to protect" by prescribing immunity through the statutes, *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941). That is precisely the way Congress used the term in 12 U.S.C. 2134.

The Court's prior cases addressing Farm Credit System bank immunity concerned the immunity of federal land banks, and the Court properly focused on the statutorily granted immunity because where "an

---

established the present limits."). In recent times, Congress routinely addresses state tax immunity by statute, *e.g.*, 12 U.S.C. 531 (Federal Reserve Banks immune); 12 U.S.C. 1768 (federal credit unions immune). This obviates the need for the Court to set precise contours for judicially created immunity.

express immunity has been conferred, there is no need to consider whether the doctrine of implied immunity applies." *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146, 156 (1961). Nor does the Court's 1941 insistence that the federal land banks' lending function was "governmental" change the analysis. *Bismarck Lumber*, 314 U.S. at 102. First, the context for that statement was the Depression period which saw increased Government investment and ownership of the land banks. *See Federal Land Bank v. Priddy*, 295 U.S. 229, 232, n.1, 2 (1935) (noting resurgence of Government ownership in the wake of 1932 legislation). Second, the Court more recently pronounced that the commercial lending business of production credit associations involved "interests that are not coterminous with those of the Government any more than most commercial interests." *Arkansas*, 520 U.S. at 831.

Moreover, in asserting its alleged immunity as an "instrumentality," the fact the NBC is a privately owned commercial business is significant, because the state tax immunity it claims is a sovereign interest of the United States itself, which is most appropriately claimed by the National Government. The Court has cautioned that "where [state tax] immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed." *Graves*, 306 U.S. at 483. Indeed, in *Arkansas v. Farm Credit Servs. of Central Arkansas*, No. 95-1918, the United States disclaimed the state tax immunity asserted by the

production credit associations, another privately held commercial lender within the Farm Credit System.

Two additional differences make *McCulloch* inapposite. First, the Maryland tax in *McCulloch* applied only to banks or branches establishing offices in the state "without authority from the state first had and obtained." 17 U.S. (4 Wheat.) at 320-321. In other words, Maryland-chartered banks did not pay, and the tax was therefore discriminatory. This Court has explained the significance of the nondiscrimination principle in terms of its providing a "political check . . . when a state tax falls on a significant group of state citizens who can be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government." *Washington v. United States*, 460 U.S. 536, 545 (1983). In the arena of State immunities from federal taxation the Court has gone so far as to call the "nondiscrimination principle" the "heart of modern intergovernmental tax immunity case law." *South Carolina v. Baker*, 485 U.S. 505, 525 n.15 (1988).

Second, Congress had not addressed the subject of state tax immunity in *McCulloch*, but by contrast the Farm Credit Act repeatedly addresses immunity and indeed supplied limited immunity to banks for cooperatives at 12 U.S.C. 2134. Where Congress speaks, its word should be heeded and should control.

B. Because Congress systematically addressed the scope of state tax immunity in the Farm Credit Act, no non-statutory doctrine of immunity applies.

1. *Expressio unius* defeats the NBC's immunity claim.

At 12 U.S.C. 2134, Congress specifically addressed the state-tax immunity of banks for cooperatives. Applying ordinary rules of construction, including most prominently the doctrine *expressio unius est exclusio alterius*, Congress should be understood to have intended that banks for cooperatives enjoy only the immunities it expressly granted—and more than that: Congress intended banks for cooperatives to have no immunities beyond those expressly granted. That affirmative intent of Congress should control, because "the area [of intergovernmental tax immunity] is one over which Congress is the principal superintendent," *Acker*, 119 S.Ct. at 2077-78 (1999); and because "[w]ise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy" so that such problems "are ones which Congress is best qualified to resolve," *United States v. Detroit*, 355 U.S. 466, 474 (1958). *Accord Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 191 (1987) ("[O]ur job is neither to assess the underlying merits of the program, nor to opine on whether Congress would be wise to exempt Ginnie Maes from state taxation . . .. A court must proceed carefully when asked to recognize an

exemption from state taxation that Congress has not clearly established."); *Smith v. Davis*, 323 U.S. 111, 119 (1944) ("All of these related statutes are a clear indication of an intent to immunize from state taxation only the interest-bearing obligations of the United States which are needed to secure credit to carry on the necessary functions of the government. That intent . . . should not be expanded upon or modified in any degree by the judiciary."); *Intel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 75-76 (1993); *Wardair Canada, Inc. v Florida Dep't of Revenue*, 477 U.S. 1, 11-13 (1986).

This reasoning derives additional force from the context: a claim that the Supremacy Clause precludes the ordinary, nondiscriminatory operation of state tax law with respect to a federally chartered entity. In another Supremacy Clause context, that of pre-emption, the Court has clarified that an express pre-emption statute should ordinarily control the scope of pre-emption. In *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504 (1992), the Court considered the extent to which federal laws that require warnings on cigarette labels pre-empted state law causes of action based on failure to fully disclose the dangers of smoking. The Court of Appeals had found that the pre-emption provision in the acts did not preclude the state damage actions, but proceeded to engage in an "implied pre-emption" analysis, concluding that state claims were precluded. This Court reversed in part, holding the appellate court erred by judicially re-determining the potential conflicts between state and federal laws. This was error, because Congress's pre-emption

provision showed that Congress had already determined and decided the question:

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in §5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation. Such reasoning is a variant of the familiar principle of expressio unius est exclusio alterius: Congress's enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

505 U.S. at 517 (internal cites omitted). This rationale is equally compelling in determining the scope of tax immunity here, and it precludes inferring any intent of Congress to confer income tax immunity on the NBC. As the preceding section of this brief shows, no extra-statutory reason justifies such immunity either. *See, Freightliner Corp. v. Myrick*, 514 U.S. 280, 288-89 (1995).

In opposing certiorari in this case, the respondent has argued that the 1985 amendments to 12 U.S.C. 2134 somehow evinced a legislative intent to

"no longer authorize[ ] state taxation of the banks for cooperatives." Brief in Opposition at 5-6. Section 2134 furnishes a decidedly odd context for such an argument, given that the 1985 amendment deleted a broad immunity that had previously existed when the government owned shares, and left in place only a limited immunity of obligations and debentures. The NBC's submission would render nugatory Congress's careful drafting of a limited immunity provision. That suggested construction is wrong as a matter of the statutory language and legislative history of 12 U.S.C. 2134, as the petitioner's brief shows in greater detail.

But it is also wrong for a larger reason. The Farm Credit Act of 1971, as amended (the "Act"), constitutes the enabling legislation for chartering and regulation of Farm Credit System entities. Of particular importance are the comprehensive amendments of the Act in the Agricultural Credit Act of 1987, which strongly promoted mergers of entities within the System, *see* 12 U.S.C. 2279a *et seq.*, and in particular the merger of various banks for cooperatives into one National Bank for Cooperatives, Agricultural Credit Act of 1987, P. L. 100-233, 101 Stat. 1639, §413 (1988). The Act systematically addresses state tax immunity by detailing which entities are free of which taxes. *E.g.*, 12 U.S.C. 2023 (broad immunity, including exemption of the banks and the "capital, reserves, and surplus thereof, and the income derived therefrom," for Farm Credit Banks created out of merger of former Federal Land Banks with former Federal Intermediate Credit Banks); 12 U.S.C. 2098 (broad immunity for federal land bank associations); 12 U.S.C. 2077 (narrow immunity for production credit associations).

"It is presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, (1994), citing *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (holding in part that inclusion of "generating waste" language in other portions of environmental act indicated that its omission from exemption section meant facility engaged in generating waste was not within exemption) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam) (holding that section of crime act did not impliedly deprive judge of statutory discretion where language in other sections in the same act did so explicitly).

Thus, where Congress intended broad immunity, including such immunities as are claimed in this case, it crafted language that explicitly conferred such immunity, 12 U.S.C. 2023, 12 U.S.C. 2098. Under the reasoning of *Environmental Defense Fund*, *Keene Corp.*, and *Rodriguez*, Congress must be presumed to have acted intentionally and purposely both by not including broad immunity language in Section 2134, and by expressly conferring a lesser immunity on banks for cooperatives. In short, the laws Congress wrote compel the inference that Congress affirmatively intended that banks for cooperatives not enjoy broad immunity of its property, transactions and income.

2. Because Congress adopted the method of explicitly specifying immunities in the Farm Credit Act, no immunities should be recognized under the Act except those explicitly authorized by statute.

The foregoing discussion clarifies that state tax immunity *vel non* needs to be decided as a matter of Congress's intent under the Act. But that is not the whole story. Congressional intent can be discerned either through reading an express grant of immunity or, in a proper case, through a statutory implication of immunity. With the Farm Credit System, however, Congress chose the method of detailing which institutions should be immune from which taxes, and consequently, claims of implied immunity simply cannot be squared with the Act.

The prime example for an implied grant of immunity by Congress comes from the national banks, where Congress passed a statute expressly consenting to particular types of taxes. By implication, those taxes Congress did not expressly allow were intended to be precluded. That is the gravamen of the majority opinion in *First Agricultural National Bank*, *supra*.

As previously noted, the Court in the 1899 *Owensboro* decision had pronounced national banks immune on general pre-emption principles in the first instance, even apart from Congress's explicit statute addressing state taxation of those banks. In 1968, the Court confronted the argument that the nature of the

national banks' activity had so changed that state tax immunity was unwarranted. Specifically, the State argued that through the Federal Reserve Act of 1913 and later developments, the Federal Reserve System displaced the former function of the national banks in issuing currency and serving as fiscal agents of the Federal Government. *See* 392 U.S. at 356-57 (opinion of Marshall, J., dissenting).

In the face of this contention, the Court preserved broad immunity for the national banks, but in doing so the Court found it "unnecessary to reach the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities." 392 U.S. at 341. Instead, the Court relied on "pertinent congressional legislation in the banking field." *Id*. Specifically, the Court cited the statute consenting to particular categories of state taxation, reviewed the congressional debates underlying that legislation, and held the Congress reached a "compromise which permitted state taxation of national banks in certain ways, but prohibited all other forms of state taxation." 392 U.S. at 343. The Court declined to "change what legislative history and prior decisions have established is the precise meaning of an Act of Congress." 392 U.S. at 345. Thus, the Court decided the national bank immunity question solely as a matter of construing Congress's intent from statutes and history, and concluded that taxes not expressly permitted were impliedly precluded.

By stark contrast, Congress throughout the history of the Farm Credit System has specifically and expressly stated what degree of immunity should be

enjoyed by which institutions. That was so in the Federal Farm Loan Act of 1916, 64th Cong., 1st Sess., ch. 245, §26, 39 Stat. 360, 380 (1916), which originally authorized and immunized the federal land banks; and also in the Farm Credit Act of 1933, 72nd Cong., 2nd Sess., ch. 98, §63, 48 Stat. 257, 267 (1933), authorizing and immunizing the production credit associations and banks for cooperatives. When Congress amalgamated prior Farm Credit System legislation in the Farm Credit Act of 1971, Pub.L. No. 92-181, §§ 2.17, 3.13, 85 Stat. 583, 602, 608 (1971), the same approach prevailed. When Congress chose to authorize "service corporation" subsidiaries for Farm Credit System entities in 1980, it crafted a pass-through provision that specifically referenced tax immunities, 12 U.S.C. 2214, Farm Credit Act Amendments of 1980, Pub. L. 96-592, § 404, 94 Stat. 3437, 3447-48 (1980). Because of this method of granting immunity through express provision, state tax administrators are justified both in recognizing those immunities expressly granted and denying any claim of immunity not founded upon an explicit authorization of immunity in the statute.

That means the NBC's immunity claim here must fail. Elsewhere in the Farm Credit System, this reasoning becomes significant for claims of immunity by entities that arose from certain other mergers consummated in the wake of the Agricultural Credit Act of 1987's amendments to the Farm Credit Act. The 1987 Act encouraged and authorized not only the merger of former banks for cooperatives into the National Bank for Cooperatives, but also mergers of "unlike associations," 12 U.S.C. 2279c-1, which

themselves each had statutes conferring differing degrees of immunity.

The example for this in the existing case law is the "agricultural credit associations" ("ACAs"). ACAs result from merger of federal land bank associations, which enjoyed broad immunity at 12 U.S.C. 2098, and production credit associations, which enjoyed a limited immunity statute like the NBCs, 12 U.S.C. 2077. Immunity status after merger was addressed by the Indiana Tax Court in 1997 (*Farm Credit Servs. of Mid-America v. Dep't of State Revenue*, 677 N.E.2d 645 (Ind. Tax 1997), and again in 1999 (*Farm Credit Servs. of Mid-America v. Dep't of State Revenue*, 705 N.E.2d 1089 (Ind. Tax 1999).) Contrary to that Indiana court's theory, however, Congress's pattern of expressly granting specific degrees of immunity to specific entities indicates Congress intended no immunity for the new entity, the ACA, once the merger was complete. Nor is that construction anything but consistent with the overall intent to privatize the Farm Credit System and, through mergers, to make its entities viable private players in the agricultural lending market.[3]

---

[3] It is worth noting that, after the tax years at issue in this case, the NBC merged with the former Farm Credit Bank of Springfield. The farm credit banks, in turn, resulted from merger of federal land banks and district federal intermediate credit banks, and the successor entities were accorded broad state tax immunity at 12 U.S.C. 2023. Thus, CoBank as it exists today, after the period at issue, parallels the situation with the ACAs: entities with different degrees of statutorily prescribed immunity merged and formed an entity that can point to no provision explicitly granting it immunity.

As if to make its silence even more significant, Congress in the Agricultural Credit Technical Corrections Act of 1988, Pub. L. 100-399, 102 Stat. 989, 1003 (1988), added 12 U.S.C. 2279g—a provision that expressly exempts merger transactions themselves from certain taxes and prevents States from reassessing upward the value of corporate property based upon occurrence of the merger. Absent once more is any mention of an immunity for the entities after the merger.

Of course the immunity *vel non* of Farm Credit System entities other than the NBC is not before the Court, and cannot be properly decided here. But in resolving this case it would be proper for the Court to admonish that the immunity of Farm Credit System entities generally should rest upon determination of Congress's intent in the Farm Credit Act, and not upon reference to any extra-statutory doctrine of immunity. The need for such admonition is evidenced not only by the decision below, and by the Indiana Tax Court rulings regarding the agricultural credit associations, but also by state court rulings concerning the immune status of production credit associations. *See Farm Credit Servs. of Central Arkansas v. Arkansas*, 994 S.W.2d 453 (Ark. 1999), *cert. denied sub nom., Arkansas v. Farm Credit Servs. of Central Arkansas*, No. 99-993, 68 U.S.L.W. 3613, 120 S.Ct. 1530 (Mar. 27, 2000); *Northwest Lousiana PCA v. State of La. Dep't of*

Revenue and Taxation, 746 So.2d 280 (La. App. 1999); *In re: Appeal of Farm Credit Servs. of Central Kansas et al.*, Nos. 1998-2839-DT et al., 1999 Kan. Tax LEXIS 78 (Oct. 25, 1999); *CoBank ACB v. Fisher*, No. 99CV437 (Colo. Dist. Ct. June 15, 2000), *but see PCA of Eastern N.M. v. Taxation and Revenue Dep't*, No. 20,078, 2000 N.M. App. LEXIS 8 (Feb. 1, 2000), *review denied*, 997 P.2d 820 (N.M., Mar. 13, 2000), *cert. petition docketed* July 28, 2000 (No. 00-156); *In re Farm Credit Servs. of Western New York ACA*, Nos. 816576, 816604, 816605, 816606, 2000 N.Y. Tax LEXIS 7 (Jan 13, 2000).

C. Principles of federalism call for a "clear statement" of Congress's intent to grant immunity.

In *Dep't of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994), the Court decided that the restrictions on state taxing power enacted as part of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), which on their face prohibited discriminatory property tax rates, did not erase the State's discretion to exempt various classes of non-railroad property from its generally applicable *ad valorem* property tax. After analyzing the statutes, the Court observed:

> Principles of federalism support, in fact mandate, our view. Subsection (b)(4), like the whole of §11503 [49 U.S.C. 11501], sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty.

> When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope.

510 U.S. at 345 (internal cites omitted). This doctrine applies not only to taxation, but to every fundamental sovereign power of the States, and has led the Court to formulate a "clear statement" or "plain statement" rule, *see Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) ("plain statement rule" means that "[i]f Congress intends to alter the usual constitutional balance between the states and the Federal government," it must make its intention to do so "unmistakably clear in the language of the statute"[internal cites omitted]). The Court has called the power to tax "the most basic power" of State government, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940); congressional interference with it cannot be lightly implied, but must be clearly expressed in the statute.

Because no provision of the Act—and certainly not 12 U.S.C. 2134—makes any plain statement that the NBC should be exempted from nondiscriminatory state income taxes, no such immunity should be recognized.

CONCLUSION

For all of the foregoing reasons, the decision of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
ROBERT C. MAIER*
*Counsel of Record for *Amici*
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

August 24, 2000.